

ESTTA Tracking number: **ESTTA672214**

Filing date: **05/13/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

## Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

### Opposer Information

Name	Novadaq Technologies Inc.
Granted to Date of previous extension	05/13/2015
Address	5090 Explorer Drive Suite 202 Mississauga, ON L4W4T9 CANADA
Attorney information	Jennifer Lee Taylor Morrison & Foerster LLP 425 Market Street San Francisco, CA 94105 UNITED STATES jtaylor@mofo.com, jliou@mofo.com, lsimpson@mofo.com, tmdocket@mofo.com

### Applicant Information

Application No	86207428	Publication date	01/13/2015
Opposition Filing Date	05/13/2015	Opposition Period Ends	05/13/2015
International Registration No.	NONE	International Registration Date	NONE
Applicant	Medtronic Ardian Luxembourg S.a.r.l. 102, Rue de Maraichers Luxembourg, L-2124 LUXEMBOURG		

### Goods/Services Affected by Opposition

Class 010. First Use: 0 First Use In Commerce: 0


All goods and services in the class are opposed, namely: medical apparatus and instruments, namely, a transradial catheter for use in the treatment of kidney disease, hypertension and renal denervation


### Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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### Marks Cited by Opposer as Basis for Opposition


U.S. Registration No.	2976652	Application Date	04/23/2001
Registration Date	07/26/2005	Foreign Priority	NONE

		Date	
Word Mark	SPY		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 010. First use: First Use: 2001/09/15 First Use In Commerce: 2005/03/16 Medical imaging systems comprised primarily of imaging, lighting, monitoring and video recording equipment and a computer system for controlling such equipment		


U.S. Registration No.	3180018	Application Date	08/24/2005
Registration Date	12/05/2006	Foreign Priority Date	NONE
Word Mark	SPY PAQ		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 010. First use: First Use: 2005/06/08 First Use In Commerce: 2005/06/08 Kits consisting primarily of sterile drapes, medical imaging agents and aqueous-solvents for vascular imaging		


U.S. Registration No.	4059362	Application Date	03/24/2011
Registration Date	11/22/2011	Foreign Priority Date	NONE

Word Mark	SPY Q
Design Mark	
Description of Mark	NONE
Goods/Services	Class 009. First use: First Use: 2009/01/31 First Use In Commerce: 2009/01/31 Image processing software for medical imaging apparatus

U.S. Registration No.	4172445	Application Date	01/03/2011
Registration Date	07/10/2012	Foreign Priority Date	NONE
Word Mark	SPY ELITE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 010. First use: First Use: 2011/04/30 First Use In Commerce: 2011/04/30 Medical imaging systems for the operating room consisting primarily of computerhardware and software for use with intra-operative fluorescence to observe and/or analyze changes in tissue perfusion and blood flow in vessels during surgicalprocedures		

U.S. Registration No.	4679069	Application Date	07/07/2014
Registration Date	01/27/2015	Foreign Priority Date	NONE
Word Mark	ISPIES		

Design Mark	
Description of Mark	NONE
Goods/Services	Class 041. First use: First Use: 2009/10/00 First Use In Commerce: 2009/10/00 educational services, namely conducting educational conferences in the field of medical imaging

U.S. Registration No.	4691593	Application Date	06/26/2014
Registration Date	02/24/2015	Foreign Priority Date	NONE
Word Mark	SPY		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 009. First use: First Use: 2001/09/00 First Use In Commerce: 2005/03/00 computer hardware and software for medical imaging apparatus Class 010. First use: First Use: 2001/09/00 First Use In Commerce: 2005/03/00 medical imaging apparatus comprised primarily of medical imaging hardware and software and parts and fittings therefor		

U.S. Application/ Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	ILLUMINATED BY SPY FLUORESCENCE		
Goods/Services	medical imaging apparatus comprised primarily of medical imaging hardware and software and parts and fittings therefor		

Attachments	76245422#TMSN.png( bytes ) 78699583#TMSN.png( bytes ) 85275639#TMSN.png( bytes )
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	85209177#TMSN.png( bytes ) 86330224#TMSN.png( bytes ) 86322023#TMSN.png( bytes ) Exhibits.PDF(581316 bytes ) Novadaq SPYRADIAL Opposition.pdf(224257 bytes )
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## Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Jennifer Lee Taylor/
Name	Jennifer Lee Taylor
Date	05/13/2015

## **EXHIBIT A**

**Int. Cl.: 10**

**Prior U.S. Cls.: 26, 39, and 44**

**Reg. No. 2,976,652**

**United States Patent and Trademark Office**

**Registered July 26, 2005**

**TRADEMARK  
PRINCIPAL REGISTER**

**SPY**

NOVADAQ TECHNOLOGIES INC. (CANADA  
CORPORATION)  
BOX 116 435 ELLICE AVE.  
WINNIPEG, MANITOBA, CANADA R3B 1Y6

FOR: MEDICAL IMAGING SYSTEMS COM-  
PRISED PRIMARILY OF IMAGING, LIGHTING,  
MONITORING AND VIDEO RECORDING EQUIP-  
MENT AND A COMPUTER SYSTEM FOR CON-

TROLLING SUCH EQUIPMENT , IN CLASS 10 (U.S.  
CLS. 26, 39 AND 44).

FIRST USE 9-15-2001; IN COMMERCE 3-16-2005.

SN 76-245,422, FILED 4-23-2001.

JOHN DALIER, EXAMINING ATTORNEY

## **EXHIBIT B**



Int. Cl.: 10

Prior U.S. Cls.: 26, 39 and 44

United States Patent and Trademark Office

Reg. No. 3,180,018

Registered Dec. 5, 2006

TRADEMARK  
PRINCIPAL REGISTER

SPY PAQ

NOVADAQ TECHNOLOGIES INC. (CANADA  
CORPORATION)

SUITE 306

2585 SKYMARK AVENUE

MISSISSAUGA, ONTARIO, CANADA L4W 4L5

FOR: KITS CONSISTING PRIMARILY OF STER-  
ILE DRAPES, MEDICAL IMAGING AGENTS AND  
AQUEOUS SOLVENTS FOR VASCULAR IMAGING,  
IN CLASS 10 (U.S. CLS. 26, 39 AND 44).

FIRST USE 6-8-2005; IN COMMERCE 6-8-2005.

THE MARK CONSISTS OF STANDARD CHAR-  
ACTERS WITHOUT CLAIM TO ANY PARTICULAR  
FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NO. 2,976,652.

NO CLAIM IS MADE TO THE EXCLUSIVE  
RIGHT TO USE "PACK", APART FROM THE MARK  
AS SHOWN.

SER. NO. 78-699,583, FILED 8-24-2005.

DAHLIA GEORGE, EXAMINING ATTORNEY

## **EXHIBIT C**

# United States of America

United States Patent and Trademark Office

# SPY Q

**Reg. No. 4,059,362**

**Registered Nov. 22, 2011**

**Int. Cl.: 9**

**TRADEMARK**

**PRINCIPAL REGISTER**

NOVADAQ TECHNOLOGIES INC. (CANADA CORPORATION)  
SUITE 306  
2585 SKYMARK AVENUE  
MISSISSAUGA, ONTARIO, CANADA L4W4L5

FOR: IMAGE PROCESSING SOFTWARE FOR MEDICAL IMAGING APPARATUS, IN CLASS 9 (U.S. CLS. 21, 23, 26, 36 AND 38).

FIRST USE 1-31-2009; IN COMMERCE 1-31-2009.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NOS. 2,976,652 AND 3,180,018.

SER. NO. 85-275,639, FILED 3-24-2011.

WILLIAM BRECKENFELD, EXAMINING ATTORNEY



*David J. Kyfos*

Director of the United States Patent and Trademark Office

## **EXHIBIT D**

# United States of America

United States Patent and Trademark Office

# SPY ELITE

**Reg. No. 4,172,445**

**Registered July 10, 2012**

**Int. Cl.: 10**

**TRADEMARK**

**PRINCIPAL REGISTER**

NOVADAQ TECHNOLOGIES INC. (CANADA CORPORATION)  
SUITE 306  
2585 SKYMARK AVENUE  
MISSISSAUGA, ONTARIO, CANADA L4W4L5

FOR: MEDICAL IMAGING SYSTEMS FOR THE OPERATING ROOM CONSISTING PRIMARILY OF COMPUTER HARDWARE AND SOFTWARE FOR USE WITH INTRA-OPERATIVE FLUORESCENCE TO OBSERVE AND/OR ANALYZE CHANGES IN TISSUE PERFUSION AND BLOOD FLOW IN VESSELS DURING SURGICAL PROCEDURES, IN CLASS 10 (U.S. CLS. 26, 39 AND 44).

FIRST USE 4-30-2011; IN COMMERCE 4-30-2011.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NOS. 2,976,652 AND 3,180,018.

SN 85-209,177, FILED 1-3-2011.

NICHOLAS COLEMAN, EXAMINING ATTORNEY



*David J. Kyfos*

Director of the United States Patent and Trademark Office

## **EXHIBIT E**

# United States of America

United States Patent and Trademark Office

# iSPIES

**Reg. No. 4,679,069**

**Registered Jan. 27, 2015**

**Int. Cl.: 41**

**SERVICE MARK**

**PRINCIPAL REGISTER**

NOVADAQ TECHNOLOGIES INC. (CANADA CORPORATION)  
5090 EXPLORER DRIVE, SUITE 202  
MISSISSAUGA, ON, CANADA L4W4T9

FOR: EDUCATIONAL SERVICES, NAMELY CONDUCTING EDUCATIONAL CONFERENCES  
IN THE FIELD OF MEDICAL IMAGING, IN CLASS 41 (U.S. CLS. 100, 101 AND 107).

FIRST USE 10-0-2009; IN COMMERCE 10-0-2009.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 86-330,224, FILED 7-7-2014.

MARK SPARACINO, EXAMINING ATTORNEY



*Michelle K. Lee*

Deputy Director of the United States  
Patent and Trademark Office

## **EXHIBIT F**





## United States Patent and Trademark Office

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# SPY

**Word Mark  
Goods and  
Services**

SPY

IC 009. US 021 023 026 036 038. G &amp; S: computer hardware and software for medical imaging apparatus. FIRST USE: 20010900. FIRST USE IN COMMERCE: 20050300

IC 010. US 026 039 044. G &amp; S: medical imaging apparatus comprised primarily of medical imaging hardware and software and parts and fittings therefor. FIRST USE: 20010900. FIRST USE IN COMMERCE: 20050300

**Standard  
Characters  
Claimed****Mark Drawing Code** (4) STANDARD CHARACTER MARK**Serial Number** 86322023**Filing Date** June 26, 2014**Current Basis** 1A**Original Filing  
Basis** 1A**Published for  
Opposition** December 9, 2014**Registration  
Number** 4691593**Registration Date** February 24, 2015**Owner** (REGISTRANT) Novadaq Technologies Inc. CORPORATION CANADA 5090 Explorer Drive, Suite 202 Mississauga, ON CANADA L4W4T9**Attorney of Record** Julian D. Forman**Prior Registrations** 2976652

**Type of Mark** TRADEMARK  
**Register** PRINCIPAL  
**Live/Dead Indicator** LIVE

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

NOVADAQ TECHNOLOGIES INC.,

Opposer,

vs.

MEDTRONIC ARDIAN LUXEMBOURG  
S.A.R.L.,

Applicant.

Opposition No.: TO BE ASSIGNED

Application No.: 86/207,428

Mark: SPYRADIAL

Filed: February 28, 2014

Published for Opposition: January 13, 2015

**NOTICE OF OPPOSITION**

Box TTAB FEE  
Commissioner for Trademarks  
P.O. Box 1451  
Arlington, VA 22313-1451

Novadaq Technologies Inc. (“Opposer”), a corporation organized under the laws of Canada and having its principal place of business at 5090 Explorer Drive, Suite 202, Mississauga, Ontario, Canada L4W4T9, believes that it will be damaged by registration of the SPYRADIAL mark in Application Serial No. 86/207,428, filed by Medtronic Ardian Luxembourg S.a.r.l. (“Applicant”), for certain goods in International Class 10.

As grounds for the opposition, it is alleged as follows:

1. Opposer is a leading developer of point-of-care imaging solutions in surgical applications, including real-time imaging devices and products for use in complex operations.
2. Since at least as early as March 16, 2005, and substantially prior to Applicant’s priority date for U.S. Application Serial No. 86/207,428, Opposer has continuously used and promoted its SPY and/or SPY-formative marks in the United States in connection with Opposer’s medical imaging products and educational services. Opposer’s SPY® fluorescence

imaging technology provides surgeons with real-time visualization of blood vessels, nerves and the lymphatic system during surgical procedures. Applicant's SPY-formative marks include but are not limited to SPY ELITE, SPY Q, SPY PAQ, ILLUMINATED BY SPY FLUORESCENCE and Design, and iSPIES.

3. Through continuous use and promotion of the SPY and SPY-formative marks, including but not limited to SPY ELITE, SPY Q, SPY PAQ, ILLUMINATED BY SPY FLUORESCENCE and Design, and iSPIES, in connection with medical imaging products and related educational services, Opposer has acquired common law rights in its SPY family of marks.

4. Opposer owns U.S. Registration No. 2,976,652 for SPY for "medical imaging systems comprised primarily of imaging, lighting, monitoring and video recording equipment and a computer system for controlling such equipment" in International Class 9. The application to register the SPY mark as shown in Registration No. 2,976,652 was filed on April 23, 2001, prior to Applicant's filing date for U.S. Application Serial No. 86/207,428. On March 16, 2011, Opposer filed an affidavit under Section 15 of the Lanham Act claiming incontestability for Registration No. 2,976,652. The Section 15 affidavit was acknowledged by the U.S. Patent and Trademark Office ("USPTO") on March 23, 2011. Accordingly, Opposer's rights in the SPY mark registered in Registration No. 2,976,652 are considered incontestable. Attached hereto as Exhibit A is a true and correct copy of the registration certificate for Registration No. 2,976,652.

5. Opposer owns U.S. Registration No. 3,180,018 for SPY PAQ for "kits consisting primarily of sterile drapes, medical imaging agents and aqueous solvents for vascular imaging" in International Class 10. The application to register the SPY PAQ mark as shown in Registration No. 3,180,018 was filed on August 24, 2005, prior to Applicant's filing date for U.S. Application Serial No. 86/207,428. On June 11, 2012, Opposer filed an affidavit under Section 15 of the Lanham Act claiming incontestability for Registration No. 3,180,018. The Section 15 affidavit was acknowledged by the USPTO on June 16, 2012. Accordingly, Opposer's rights in the SPY PAQ mark registered in Registration No. 3,180,018 are considered

incontestable. Attached hereto as Exhibit B is a true and correct copy of the registration certificate for Registration No. 3,180,018.

6. Opposer owns U.S. Registration No. 4,059,362 for SPY Q for “image processing software for medical imaging apparatus” in International Class 9. The application to register the SPY Q mark as shown in Registration No. 4,059,362 was filed on March 24, 2011, prior to Applicant’s filing date for U.S. Application Serial No. 86/207,428. Attached hereto as Exhibit C is a true and correct copy of the registration certificate for Registration No. 4,059,362.

7. Opposer owns U.S. Registration No. 4,172,445 for SPY ELITE for “medical imaging systems for the operating room consisting primarily of computer hardware and software for use with intra-operative fluorescence to observe and/or analyze changes in tissue perfusion and blood flow in vessels during surgical procedures” in International Class 10. The application to register the SPY ELITE mark as shown in Registration No. 4,172,445 was filed on January 3, 2011, prior to Applicant’s filing date for U.S. Application Serial No. 86/207,428. Attached hereto as Exhibit D is a true and correct copy of the registration certificate for Registration No. 4,172,445.

8. Opposer owns U.S. Registration No. 4,679,069 for iSPIES for “educational services, namely conducting educational conferences in the field of medical imaging” in International Class 41. The application to register the iSPIES mark as shown in Registration No. 4,679,069 was filed on July 7, 2014, with a claimed first use date and first use in commerce date of October 2009. Attached hereto as Exhibit E is a true and correct copy of the registration certificate for Registration No. 4,679,069.

9. Opposer owns U.S. Application Serial No. 86/322,023 for SPY for “computer hardware and software for medical imaging apparatus” in International Class 9 and “medical imaging apparatus comprised primarily of medical imaging hardware and software and parts and fittings therefor” in International Class 10. The application was filed on June 26, 2014, with a claimed first use date of September 2001 and first use in commerce date of March 2005. Attached hereto as Exhibit F is a true and correct copy of a printout from the TESS electronic

database of the USPTO, showing the current status and title of Application Serial No. 86/322,023.

10. Moreover, having continuously used the ILLUMINATED BY SPY FLUORESCENCE mark since 2014 to promote its medical imaging equipment and to increase awareness of Opposer's proprietary SPY® fluorescence imaging as the core technology in Opposer's products, Opposer owns all rights in the ILLUMINATED BY SPY FLUORESCENCE and Design mark, shown below:



The ILLUMINATED BY SPY FLUORESCENCE and Design mark appears on each of Opposer's products that uses Opposer's proprietary SPY® fluorescence imaging technology, as well as in marketing materials for those products.

11. Opposer owns the goodwill and reputation of the goods connected with and symbolized by the SPY and SPY-formative marks, including but not limited to SPY ELITE, SPY Q, SPY PAQ, ILLUMINATED BY SPY FLUORESCENCE and Design, and iSPIES. Opposer regularly exhibits its medical imaging products at trade shows and conventions. As a result of extensive advertising, promotion and sales of Opposer's products under the SPY and SPY-formative marks, Opposer has built up highly valuable goodwill in Opposer's SPY and SPY-formative marks, including but not limited to SPY ELITE, SPY Q, SPY PAQ, ILLUMINATED BY SPY FLUORESCENCE and Design, and iSPIES, and said goodwill has become closely and uniquely identified and associated with Opposer and Opposer's products and educational services.

12. On February 28, 2014, Applicant, a limited liability company organized under the laws of Luxembourg and located at 102 Rue de Maraichers, Luxembourg L-2124, filed U.S. Application Serial No. 86/207,428 in International Class 10 for the mark SPYRADIAL on an intent-to-use basis, claiming priority from an EU application filed on February 27, 2014. U.S. Application Serial No. 86/207,428 was published in the *Official Gazette* on January 13, 2015.

13. By the application herein opposed, Applicant seeks to register the mark SPYRADIAL for “medical apparatus and instruments, namely, a transradial catheter for use in the treatment of kidney disease, hypertension and renal denervation” in International Class 10.

#### LIKELIHOOD OF CONFUSION

14. Applicant’s proposed SPYRADIAL mark contains Opposer’s SPY mark and the dominant SPY element of its family of SPY-formative marks, making Applicant’s and Opposer’s respective marks confusingly similar in appearance, sound, meaning, connotation, and commercial impression. The term “RADIAL” is descriptive of a feature of Applicant’s goods because Applicant’s goods are transradial catheters. Therefore, “SPY” is the dominant element of Applicant’s mark, which is identical to Opposer’s SPY mark and to the dominant SPY element of Opposer’s family of SPY-formative marks.

15. Opposer is informed, believes and on that basis alleges that the medical instruments identified in Application Serial No. 86/207,428 are related to the products offered under Opposer’s SPY and SPY-formative marks and covered by Opposer’s prior registrations. Opposer has offered such medical products in commerce under SPY and/or SPY-formative marks since as early as March 2005, well prior to the priority date in the opposed application.

16. Opposer is informed, believes and on that basis alleges that Applicant’s customers for the medical instruments identified in Application Serial No. 86/207,428 are likely to consist of many of the same customers who are already familiar with Opposer’s medical products and related educational services. The products provided by Applicant and the products and services provided by Opposer are both likely to be used by medical professionals.

17. Opposer is informed, believes and on that basis alleges that Applicant will offer and distribute its products through channels of trade that will overlap with those used by Opposer to offer and distribute Opposer's medical products.

18. In view of the fact that Applicant's SPYRADIAL mark is confusingly similar to Opposer's SPY and SPY-formative marks, including but not limited to SPY ELITE, SPY Q, SPY PAQ, ILLUMINATED BY SPY FLUORESCENCE and Design, and iSPIES; that Applicant's and Opposer's medical products and medical instruments are related; and that the customers and trade channels for Applicant's and Opposer's medical products and medical instruments will be the same or overlapping, Applicant's SPYRADIAL mark is likely to cause confusion with Opposer's SPY and SPY-formative marks, or to cause mistake, or to deceive as to the origin, source, or sponsor of Applicant's goods. Opposer would thereby be injured by Applicant's use and registration of mark in Application Serial No. 86/207,428 in International Class 10.

Filing Fee: The USPTO is authorized to charge \$300.00 for the Notice of Opposition to International Class10 to Morrison & Foerster LLP's Deposit Account 031952 (Reference No. 57767-6001502).



WHEREFORE, Opposer prays that Application Serial No. 86/207,428 be rejected in International Class10 and that no registration be issued thereon to Applicant, and that this opposition be sustained in favor of Opposer.

Respectfully submitted,



Dated: May 13, 2015

By:

---

Jennifer Lee Taylor  
Attorney for Opposer  
Novadaq Technologies Inc.

Morrison & Foerster LLP  
425 Market Street  
San Francisco, California 94105-2482  
Telephone: (415) 268-6538  
Facsimile: (415) 268-7522

### **PROOF OF SERVICE BY MAIL**

I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California, 94105; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Morrison & Foerster's practice for collection and processing of correspondence for mailing with the United States Postal Service and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Morrison & Foerster with postage thereon fully prepaid for collection and mailing.

I further declare that on May 13, 2015 I served a copy of:

### **NOTICE OF OPPOSITION**

on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and mailing at Morrison & Foerster LLP, 425 Market Street, San Francisco, California, 94105, in accordance with Morrison & Foerster's ordinary business practices:

**Medtronic, Inc.  
710 Medtronic Pkwy  
Minneapolis, MN 55432-5604**

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at San Francisco, California, this 13th day of May, 2015.

\_\_\_\_\_  
Lorna Simpson  
(typed)

\_\_\_\_\_  
  
(signature)